BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARGARET LEANN OLDS-CARTER	)	
Claimant	)	
	)	
VS.	)	
	)	
LAKESHORE FARMS, INC.	)	
Uninsured Respondent	)	Docket No. **1,035,967**
	)	
AND	)	
	)	
KS. WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of the October 19, 2007 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant was an independent contractor and therefore denied benefits. The ALJ further found that respondent was engaged in a commercial trucking enterprise and not an agricultural pursuit.

The claimant requests review of whether claimant was an employee or an independent contractor. Claimant argues respondent had control over the claimant and therefore she was respondent's employee.

The respondent argues the activities of Lakeshore Farms reflect agricultural pursuits and therefore it is exempt from coverage under the Act. In addition, respondent argues it did not have the requisite payroll to be covered by the Act. Finally, respondent argues that claimant was an independent contractor and the ALJ's Order should be affirmed.

The Workers Compensation Fund (Fund) argues claimant was an independent contractor and the ALJ's Order should be affirmed. In the alternative, the Fund argues respondent was involved in an agricultural pursuit and therefore is exempt from coverage under the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Jonathan L. Russell, sole owner, officer, director, and shareholder of Lakeshore Farms, Inc., testified the company became incorporated in 2001 and its assets include equipment such as semi-trucks, trailers, combines, tractors, planters and sprayers. The company currently has six semitractor-trailers which are driven by individuals. The equipment is then leased out. Mr. Russell indicated that he paid Lakeshore Farms, Inc. for the use of the equipment in his farming operations. The semi-tractor-trailers are used to haul Mr. Russell's grain that is harvested in September, October and November. But the semi-tractor-trailers are also leased to individuals who are expected to independently haul grain for respondent as well as for others and generate a gross amount of at least $2,400 a month.

Mr. Russell indicated the drivers are told they are independent contractors and that no taxes would be withheld from their paycheck. The drivers receive 25 percent of the gross revenues received per load hauled. But respondent bills the customer for the loads hauled and payment for the loads are made to respondent. Respondent owns the semi-trucks and trailers, pays for the fuel, pays for maintenance and repair, pays the insurance, licenses the trucks and obtains U.S. Department of Transportation permits and certificates for the trucks.

Mr. Russell testified that respondent is required by law that its drivers be subject to random drug testing. On a form listing the drivers subject to testing, claimant is listed and identified as an employee.

Claimant began working full-time on March 5, 2007, as a semitractor-trailer driver for respondent. Her job duties included driving a semi truck with a grain wagon and hauling the grain. Claimant was expected to contact brokers and arrange to haul loads of grain for them. She said her pay was calculated in the following manner:

> Q. Okay. And how would you get paid?
>
> A. It was -- we'd haul it, do our load sheets, take the amount that -- like 40 cents a bushel, 25 cents a bushel, whatever it was paying, we'd take it times the gross bushels that we had on the trailer, and that full amount would go to the truck, and then we would divide it by four.
>
> Q. Now, were there times that Mr. Russell would direct you as to who you were going to haul for?
>
> A. Yes.[1]

[1] P.H. Trans. at 16.

Before starting work for the respondent, claimant had a discussion with Mr. Russell about the taxes not being taken out of her check. Mr. Russell owned the semi-trucks and therefore provided them to the drivers. He also provided the grain trailers. Mr. Russell paid for all maintenance, repairs, insurance, permits, certificates and fuel. And claimant testified that if respondent had grain that needed hauled that took precedence over any jobs she had arranged.

> Q. Counsel asked you some questions about the rate you were being paid for bushels of grain that were being hauled. If you happened to have a, you know, job that you could do for Bartlett or Cargill that was paying 30 cents a bushel but Mr. Russell called and said, "I want you to haul some grain from this elevator at 17 cents a bushel," which job would you have to take?
>
> A. Mr. Russell's.
>
> Q. Why?
>
> A. Because he was our boss. He's the one we drove for.
>
> Q. And it's his truck?
>
> A. His truck.
>
> Q. And even though the Bartlett or Cargill may pay a lot more, you would still haul for Mr. Russell?
>
> A. Yes.[2]

William V. Carter, claimant's husband, testified that he was also a driver for the respondent and that Mr. Russell's requests to haul a load would take precedent over any other dealings with brokers. Mr. Carter further testified that even if the loads were for brokers the money earned was given to Mr. Russell and then he would receive his 25 percent. Jeri R. Lee, another driver for respondent testified on claimant's behalf that Mr. Russell was her boss and his loads were priority over any other loads.

On July 18, 2007, claimant was enroute to pick up a load of corn at the Robinson elevator and take it to an ethanol plant in Garnett, Kansas. About three quarters of a mile north of Robinson, claimant was slowing down to go into a curve when her right front tire dropped off the road and the truck went out of control. Claimant was transported by ambulance to Hiawatha County Hospital's emergency room. She was diagnosed with a compression fracture to the L2 vertebra and has been off work since the accident.

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[2] *Id.* at 54.

Initially, it is argued that respondent was engaged in an agricultural pursuit. While the record shows that Mr. Russell was involved in agriculture, there is no such evidence with respect to respondent, Lakeshore Farms, Inc. This issue seems to be answered by the Kansas Court of Appeals opinion in *Frost*[3]. In that case, the Court held that the determination of whether a workers compensation claimant was engaged in an agricultural pursuit at the time of the injury requires a two-step analysis. The first question is whether the employer was engaged in an agricultural pursuit. If the answer to that question is no, then the court may find that there is coverage. If the answer is yes, then it must be determined if the injury occurred while the employee was engaged in an employment incident to the agricultural pursuit. Here, the general nature of the respondent's business was leasing equipment and conducting a commercial trucking enterprise, not agriculture as that term is commonly understood. Accordingly, this Board Member finds claimant was not engaged in an agricultural pursuit at the time of her accident.

The next issue is whether claimant was an employee or an independent contractor. It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.[4]

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[5] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[6]

The test primarily used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[7]

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[3] *Frost v. Builders Service, Inc.*, 13 Kan. App. 2d 5, 760 P.2d 43, *rev. denied* 243 Kan. 778 (1988).

[4] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[5] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

[6] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[7] *Wallis* at 102-103.

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

(1) The existence of a contract to perform a piece of work at a fixed price.

(2) The independent nature of the worker's business or distinct calling.

(3) The employment of assistants and the right to supervise their activities.

(4) The worker's obligation to furnish tools, supplies and materials.

(5) The worker's right to control the progress of the work.

(6) The length of time the employee is employed.

(7) Whether the worker is paid by time or by job.

(8) Whether the work is part of the regular business of the employer.[8]

The evidence contains elements pertaining to both an employee and independent contractor relationship. However, this Board Member concludes the evidence is more heavily weighted in favor of an employer/employee relationship and that relationship was with respondent. Respondent provided all of the tools for the job and through Mr. Russell had the right of control over the work claimant would perform. Although the right to control claimant's work was not frequently exercised, nonetheless, the preponderance of the evidence established respondent could direct what loads claimant would haul. Moreover, if claimant did not generate at least $2,400 per month the respondent had the right to discharge her. Furthermore, the work claimant was performing was an integral part of the regular business of the respondent.

The next issue is whether respondent had the requisite payroll to be subject to the Act. The Kansas Workers Compensation Act applies to those employers who have a minimum annual payroll of $20,000 to non-family employees.[9]

Respondent conducts business year-round. According to claimant, she earned on the average approximately $471.53 per week working for respondent. In addition, respondent employed between 4 and 5 other drivers who also were paid 25 percent of the gross received by respondent per load hauled.

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[8] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

[9] K.S.A. 44-505(a)(2).

When considering the entire record and the reasonable inferences that may be drawn from that evidence, this Board Member concludes that respondent's annual payroll to non-family members exceeded $20,000. Consequently, the Kansas Workers Compensation Act applies to this claim.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated October 19, 2007 is reversed to find claimant was an employee of respondent and otherwise affirmed. Claimant's request for medical treatment and temporary total disability compensation is remanded for determination by the ALJ and, if necessary, further proceedings.

IT IS SO ORDERED.

Dated this _____ day of January 2008.

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BOARD MEMBER

c: Timothy J. Pringle, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Matthew R. Bergmann, Attorney for Fund
Bryce D. Benedict, Administrative Law Judge

[10] K.S.A. 44-534a.

[11] K.S.A. 2006 Supp. 44-555c(k).